affirmation

Ontario Human Rights Commission

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Effect not intent is primary

by Tanja Wacyk

Employees who have been discriminated against no longer have to prove that the discrimination was intentional in order to get relief under human rights legislation.

In two key human rights judgements, the Supreme Court of Canada has ruled that the intent to discriminate is not a governing factor in construing human rights legislation aimed at eliminating discrimination. Rather, it is the result or effect of the alleged discriminatory action that is significant.

In the first case, the Court ruled that Teresa O'Malley had been discriminated against when her employer, Simpsons-Sears, failed to provide reasonable accommodation of her religious beliefs.

Mrs. O'Malley had been working for Simpsons for seven years when she joined the Seventh Day Adventist Church, which regards Saturdays as the Sabbath and prohibits members from working on that day. When Mrs. O'Malley told her employer she could no longer work on Saturdays, the immediate response was that she must resign. Simpsons-Sears did subsequently offer her part-time work, which Mrs. O'Malley accepted. The change to part-time hours, however, resulted in a significant drop in her hours and an accompanying drop in wages and benefits.

In reaching its decision, the Supreme Court unanimously overturned lower court rulings that had held there could be no breach of the anti-discrimination provisions of the *Ontario Human Rights Code* unless the employer intended to discriminate on one of the prohibited grounds and that there was clearly no such intent in Mrs. O'Malley's case. The Supreme Court of Canada held instead that 'an employment rule honestly made for sound economic or business reasons, equally applicable to all to whom it is intended to apply, may yet be discriminatory if it affects a person or group of persons differently from others to whom it may apply.' In finding for Mrs. O'Malley, the Court stated that, while there is a duty to accommodate imposed on the employer, this duty exists within some realistic limits and does not extend so far as to require the employer to take measures that would result in undue hardship. In other words, the Court held that the employer must take such steps that may be reasonable to accommodate the religious beliefs of an employee without undue interference in the operation of the employer's business and without undue expense to the employer.

The Court also held that the onus of proving undue hardship rests on the employer as it is the employer

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Vancouver's great idea

by Leslie Blake-Côté

The city of Vancouver provides a unique service — taxi cabs for the disabled. These are used Checker Cabs converted to accommodate wheelchairs. From most people this might elicit a 'so what? — big deal.' But for people confined to a wheelchair it's a tremendously big deal.

Catherine Frazee, Ontario human rights commissioner and product standards co-ordinator with Imperial Oil , suffers from a muscular condition known as amytonia, and, much like a quadriplegic, is confined to a wheelchair. Catherine knows only too well the restrictions and limitations this entails.

Vividly, she recalls her 1982 move to Toronto. 'I arrived at the airport, lock, stock and barrel and I wanted a wheelchair van, but they didn't come out to the airport. Then, I tried to get an ambulance, but they were going to charge me $150 , and I'd have had to have got out of the chair and lie down on a stretcher. Finally, some ground crew heard of the problem, and one of them had a van. They were finishing a shift and lifted me into the van and took me to my hotel.'

Despite the fact that Catherine now has her own fully equipped van and drivers, problems still arise — like the time she couldn't get a driver and had to hire a limousine. For $40 an hour he parked his car in her driveway and drove her van.

So Catherine is excited about the Vancouver service. 'The whole idea of integration of the handicapped is to make life as normal as possible. And, too, it gives the disabled more entry into the mainstream of society,' she adds.

This service will prove invaluable for Expo-86. It was started in 1984 by Vancouver Taxi. According to Ken Armstrong, deputy chief licence inspector for the City of Vancouver, the Committee of the Disabled and city council decided that the taxi service was necessary, so 30 special additional licences were issued. The bid was won by Vancouver Taxi, who offered the best proposal for a cab to carry wheelchairs.

According to Clive Hanbury, general manager of Vancouver Taxi, problems arose after they got the licence. The firm that was supposed to build the cars couldn't produce them on time, and so Hanbury had to scramble around for an alternative.

He ended up buying 30 used Checker Cabs for between $10,000 and $12,000 and converting them by raising the roof, installing a new door and window and adding a ramp for an additional cost of $11,000 per cab.

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When tragedy unifies a people

by W. Gunther Plaut

It happened in January, but it is still as fresh in my mind as if it had happened yesterday. We were in Florida at the time, trying to forget the world and its cares for a few days, when the 'impossible' became all too real. It was a Tuesday when the space shuttle blew up shortly after launch, and many Tuesdays have passed since then to allow for an assessment of the fallout the tragedy occasioned.

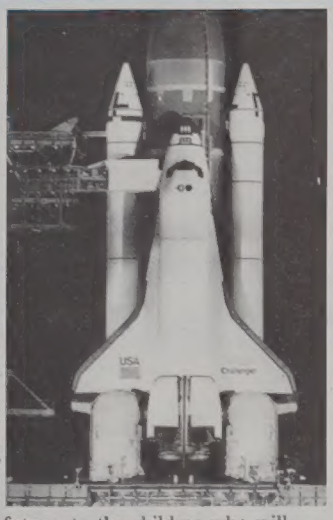
We were all witnesses to instant death. A moment before, the laughter, the confidence, the sureness of it. The cheers when the big ship lifted into the air. Then the cries of disbelief. The explosion that left no doubt what had befallen those who rode into the skies. Death was painted red against the blue horizon.

They would not return to us, that we knew. But was this death believable? Is instant dissolution of life a comprehensible and acceptable image? Over and over we saw it, yet we saw nothing. The seven who strode into the craft—was there more to them than their failure to come back? Religion has its answers for believers; the human eye has none.

We came away from the replay with a sense of deep unease. Not the guilt of Auschwitz survivors (who felt that way because they had made it), but the unease of the arrogant, who take life for granted and are dismayed only when things go awry. We learned again what we really had known all along, that life can't be taken for granted. Not only exploration is fraught with uncertainty, all living is.

Someone said that we are only at the beginning of space exploration, and that these accidents are the inevitable price we have to pay. True, as far as it goes. We are novices in space. But false, also, because there is always another frontier before us, and that price has to be paid over and over again.

And there was Christa McAuliffe, school teacher. Why was she singled out as the quintessence of the tragedy? Christa had personal charm and charisma, but so did the others who perished with her. Christa caught our imagination because she was our bridge to the



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future, to the children who will people tomorrow's world with their achievements and failures, with their vision and experience.

Children saw her as belonging to them, and when she rode into the sky, they rode with her. She was the dream of the young reflected in millions of wide eyes turned upwards. And because she was acting out the dream of children, her death writes no final line on the unseen marker in the clouds. For long after the tears have dried the dream goes on.

But there was also something else, and, in a way, it explains why the tragedy touched all of us so deeply, Canadians and Americans alike.

The seven who died were a cross-section of the hundreds of millions who populate this continent. They were man and woman, Christian and Jew, black, East Asian and white. None of the shuttle crews of the past had this composition and none of the others suffered its fate. The others were considered the select few of a special breed; the seven became, by their varied backgrounds, a mirror of all the people. When they died, something of all of us died with them. By their tragic end they helped to unify us in a way no one had foreseen, let alone planned. Yet this is what happened.

Somewhere there is a human rights message in this. Will the tragedy help us realize more clearly that, with all our differences, we are united in our humanity and must bend every effort to live as one? Or must death ring our doorbell before we know that it rings for all of us?

Dr. Plaut is editor of Affirmation.

No discrimination here?

A Summary of a Report by the Social Planning Council of Metro Toronto and the Urban Alliance on Race Relations

by Christine Silversides

Some months ago the Social Planning Council of Metropolitan Toronto and the Urban Alliance on Race Relations released a report entitled *No Discrimination Here?: Toronto Employers and the Multiracial Workforce.*

The report investigates three areas. First, it tackles organizational discrimination, that is, discrimination against minorities that results from the application of seemingly neutral personnel policies and procedures. Second, the report looks at the practices and attitudes of employers in the management of a multiracial work force. Finally, the report makes a number of policy proposals aimed at improving both employment opportunities for non-whites and race relations in the workplace.

With regard to organizational discrimination, the report points to the high degree of informality in recruitment systems and finds a correlation between the use of informal practices and low non-white representation. This is underscored by the finding that non-whites are significantly under-represented in certain occupations or sectors of the economy — notably, the trade

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who has the information necessary to show undue hardship. In Mrs. O'Malley's case, Simpsons-Sears called no evidence to prove that any further efforts to accommodate Mrs. O'Malley would have been unreasonable because of the undue hardship they would have caused. The Court held that in the absence of such evidence Mrs. O'Malley's appeal must succeed. Therefore, while the case does not cast much light on the degree of hardship that will constitute 'undue hardship', it does establish the following important principles:

1) Discrimination does not have to be intentional in order for it to violate human rights legislation.
2) In a case of adverse effect discrimination, the employer has the duty to take reasonable steps to accommodate the employee, short of undue hardship, in the operation of the employer's business.
3) The onus of proving undue hardship rests with the employer.

This case was heard under the old *Ontario Human Rights Code*, which did not contain a section that expressly states, as does section 10 in the current Code, that seemingly neutral requirements or qualifications that result in the exclusion or preference of a group of persons who are protected by the Code is prohibited. In light of section 10, this decision will have limited impact on those complaints brought under the Province's new *Human Rights Code*. It will, however, have tremendous impact in those jurisdictions that have not amended their human rights legislation to expressly address unintentional discrimination.

In the second human rights case before it, the Supreme Court turned down the appeal of Mr. K. S. Bhinder, who had lost his job of four years with Canadian National Railways because he refused to wear a safety helmet as required by safety rules. Mr. Bhinder is a Sikh, who is forbidden by his religion to wear anything on his head except a turban. In that case, the Court was again confronted with the issue of whether or not the definition of discriminatory practice, this time in the *Canadian Human Rights Act*, extended to both unintentional and adverse effect discrimination. The Court adopted the reasoning expressed in O'Malley and concluded that it did.

The majority of the Court also held, however, that because the hardhat requirement was *'bona fide'*, Canadian National Railways had a complete defence to Mr. Bhinder's complaint. This was because of the particular wording of the *Canadian Human Rights Act*, which provides for such a defence. The majority of the Court went on to state that once a working condition is established as a *bona fide* occupational requirement, the consequential discrimination, if any, is not a violation of the Act. Furthermore, the concept of the duty to accommodate could not be applied in light of the *bona fide* occupational requirement test.

The result for Mr. Bhinder was therefore dramatically different from that experienced by Mrs. O'Malley. On facts that for all purposes were identical, Mrs. O'Malley received protection from the religious discrimination against which she complained and Mr. Bhinder did not. The Court acknowledged this and expressly stated that the different outcomes in the two cases resulted from the difference between the Ontario legislation and the federal act.

Tanja Wacyk is a legal counsel with the Ontario Human Rights Commission.

Court faults Ottawa for firing man over 65 on grounds of age

Canadian Press has reported, according to the Toronto Star, a ruling by the Federal Court of Canada that the federal government was wrong to fire a civil servant over the age of 65 because he was considered too old.

The court awarded John G. Sheldrick $70,215.17 for unlawful termination of his contract by the federal Department of Industry, Trade and Commerce.

Mr. Justice Barry Strayer said federal employees over the age of 65 who are kept on cannot later be dismissed 'at whim' simply because they are over 65. They can only be dismissed on grounds applicable to any other employee or because age no longer allows them to perform their job duties.

Sheldrick turned 65 on December 14, 1981, but his employment as assistant director of the department's Financial Services Branch was extended for another two years.

Six months later, he was told his job would end on August 27, 1982 under a provision allowing a deputy minister to fire anyone who had reached 65.

The *Human Rights Code, 1981,* provides that at age 65 a person may be legally dismissed from employment because of age. Whether this exception is compatible with the *Canadian Charter of Rights and Freedoms* has not as yet been tested in court.

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Editorial

How free is freedom of speech?

The ambassador of the Republic of South Africa is scheduled to speak at the University of Toronto in a debate on his country's apartheid policy. Public protest causes the invitation to be withdrawn and then, after a public wrangle, to be re-issued. Freedom of speech, says a leading journal, is the issue. The debate takes place.

Steve Behal

James Keegstra and Ernest Zundel teach and write that the Holocaust is a Zionist hoax and that the Jews are at the centre of a world-wide conspiracy to defame innocent gentiles and to promote their own nefarious ends. The defense lawyer claims that the issue is freedom of speech and of the press and that the very act of bringing the two to court shows the extent of their enemies' power. Two Canadian juries reject the argument and convict the accused under the federal criminal statute.

Canada prides itself on its constitutional guarantees, which safeguard our freedom to say and publish what we think. Yet that very constitution also states that there are limits to these and any freedoms. The right to swing my fist ends at my neighbour's nose.

Freedom does not exist in the abstract; it is a concept that defines and regulates the relationships of human beings in their real-life situations. By its nature it does not have clearly delineated borders. A healthy society will see to it that its limits are drawn neither too tightly nor too widely.

This is what human rights legislation is all about.

Chairman's corner

Jim Merrithew

The Ontario Human Rights Commission's Annual Report for fiscal year 1985/86 will be released within the next few weeks, and it provides strong statistical and descriptive support of the level of the commission's activity over the past year.

The annual report is a valuable reference document for human rights initiatives, case summaries, legal issues, public education activities and legislative developments. If you are not already on our mailing list, I urge you to contact us in order to obtain a copy.

One of the areas of progress mentioned in the report, and about which I am particularly pleased, is backlog reduction. The great quantity of complaints received since the addition of the new grounds of protection in 1982, the increasing complexity of the cases (particularly those concerned with handicap) and the size and heterogeneity of our population combined with inadequate commission resources have contributed to an increasingly high volume of active cases. There were close to 1,800 by January 1986 compared to 831 in 1982/83. But there were only the same number of officers to deal with them.

The commission therefore created a special backlog reduction unit to administer 1,160 cases that were six months old or more. This unit, in combination with the addition of 28 officers, who began working with the commission near the beginning of this year, together with an internal review of procedures and reorganization of resources, has resulted in an estimated reduction of almost half the cases in the last four-month period. Some of our officers are now being deployed around the province on special assignments to assist in critical areas and to enhance the commission's capacity to resolve cases expeditiously.

These measures, plus the introduction of legislative initiatives, confirm the government's unqualified commitment to the eradication of discrimination in Ontario and to the assurance that we will remain in the vanguard of the protection of the basic rights of all Ontarians.

Very little of this could have been achieved without the unparalleled efforts and expertise of the commission's staff. We are truly fortunate that such dedicated individuals choose to exercise their exceptional talents and skills in the human rights arena.

I would also like to take this opportunity to express our sincere gratitude to two of our commissioners—Marie Marchand, vice-chairman, and Bev Salmon, race relations commissioner — whose terms of office expired in February 1986. Their long-standing dedication to human rights has served us well, and we wish them every success in their future endeavours.

No discrimination here?

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and education/public administration sectors. On the other hand, non-whites are over-represented in lower paying and lower prestige occupations. They work predominantly as unskilled labourers in production, service or maintenance positions.

In examining the attitudes of employers, it was found that about one-half of all employers surveyed expressed a negative view of racial minorities, either by assuming the inferiority of non-whites, indicating a willingness to exploit non-white immigrant labour, conveying fears about loss of white dominance in the labour force or revealing outright bigotry. Employers appeared reluctant to institute or participate in programs aimed at the increasing awareness of racial discrimination.

Management responses to survey questions regarding inter-racial matters produced data that indicated that many employers 'overlook or discount' inter-racial tensions within their work forces. The report indicates that little effort has been made by Toronto employers to implement race-related policies to discover or prevent discrimination in the workplace. When management does respond to complaints of discriminatory behaviour, the response is generally perceived as more punitive toward non-whites who complain about discriminatory attitudes of white co-workers. In fact, it appears that these complaints are often dealt with by punishing the non-white complainant.

The report concludes that there is a need for broad policy changes aimed at improving both employment opportunities for non-whites and race relations in the workplace. Since employers expressed a reluctance to comply with efforts to eliminate barriers to discrimination, the report says such programs must be made mandatory. It also suggests that both federal and provincial governments should strengthen the enforcement of human rights in employment through stronger sanctions.

The report points to a need for a systems approach to attack the problem of systemic discrimination in employment. It is argued that 'purposeful and organized efforts' are needed to eliminate any barrier in personnel policies or practices that may prevent non-whites from realizing their full potential in the labour market. Such efforts must promote sensitivity to racial issues through race relations training programs directed initially at management, but also at majority and minority employees. In addition, the change in racial attitudes, they say, must also be monitored both at the firm level and nation-wide.

The report advocates the strategy for 'employment equity' as proposed by the Royal Commission on Equality in Employment. This strategy calls for a clear statement of executive support, as well as for the appointment of senior management accountable for implementing the strategy, the assignment of resources and the development of a labour-management consultative process. The strategy proposes the identification and removal of discriminatory barriers in a company's hiring, training, promotion and salary policies and the implementation of alternative corrective systems, the development of special remedial measures designed to remove the effects of previous discrimination and the identification of quantifiable goals in conjunction with an appropriate monitoring system to ensure that minorities are equally represented and remunerated at all levels within the organization.

Finally, *No Discrimination Here?* stresses the need for more research. The direct test for discrimination, it says, should be replicated for a range of other occupations, age groups and places in Canada. There must also be individual in-depth case studies in order to develop a full understanding of the nature of systemic discrimination at the firm level. It would seem, however, that the problem of discrimination in the workplace is now well documented — perhaps resources should be directed toward the amelioration of these race-related problems rather than to continued research.

Christine Silversides is a student at Osgoode Hall Law School, York University, who worked with the commission during the summer of 1985.

Racial harassment

Third of three parts

by Michael Betcherman

Racial harassment is the term used to describe racial slurs, jokes, name-calling and other similar offensive behaviour. *The Ontario Human Rights Code* explicitly forbids racial harassment in the workplace. It defines 'harassment' as 'the engaging in a course of vexatious comment or conduct that is known or ought to be known to be unwelcome.'

In jurisdictions where racial harassment has not been explicitly declared illegal, tribunals have generally interpreted 'the right to be free from discrimination in employment' as including 'the right to be free from racial harassment.' In other words a tribunal that finds that an employer has been guilty of racial harassment will generally rule that the employer is guilty of racial discrimination and has therefore contravened the relevant human rights legislation.

When is an employer guilty of racial harassment?

The cases indicate that the employer will generally be found guilty of racial discrimination when the racial harassment has been exercised by supervisory and management personnel.

When the harassment has been exercised by non-supervisory personnel, the employer's liability will depend on:

whether the harassment has been extensive, intense and continuous; and

the extent of action taken by management to combat harassment.

Isolated and occasional incidents of name-calling

Verbal abuse that is an isolated incident is not generally considered to be racial harassment in contravention of the law unless committed by supervisory or management personnel.

Where the name-calling is widespread and on a continuing basis, tribunals will generally look for evidence on how management handled the situation.

For example, a warehouseman of East Indian ancestry claimed that he had been subjected to racial discrimination because of the atmosphere at his workplace.

At the hearing before a board of inquiry, evidence was presented that the warehouse atmosphere was filled with 'rough talk' consisting of racial epithets and insults from which none of the various racial and ethnic groups was exempt. However, the board found 'that the internal "pecking-order" within the warehouse placed the East Indian workers at the bottom of the informal, internal status for warehousemen. They were the butt of many of their co-workers' aggressiveness and hostility because of their race.' There was also evidence that other groups were subjected to racial harassment and that there was retaliatory name-calling. However, the board said that racial insults to one group do not justify racial insults toward another and 'two wrongs do not make a right.'

The board then examined management's treatment of the racial harassment. Although it found that 'there was no intent on the part of management...to discriminate against the East Indian workers' it found that management had failed in its duty to eradicate racial harassment in the warehouse and therefore was in breach of the *Ontario Human Rights Code*.

The evidence disclosed that in spite of numerous complaints from East Indian employees, management did not respond. No real investigation was carried out. On a few occasions management told the white employees not to harass the East Indians. However, the company's personnel manager testified that although it had occurred to him that a major problem existed, the matter was not pursued. Other evidence revealed that management told the East Indians to ignore the harassment and not retaliate.

The board criticized management for not taking reasonable steps to 'put an end to or at least minimize the racial abuse,' and for 'not imposing real, effective discipline on offending white employees.'

The warehouseman was awarded $1,000 as damages for his pain, suffering and injured feelings. However, even though the board decided that the warehouseman's reaction, which had triggered his dismissal, was caused by the racial harassment 'that permeated the work environment,' it did not award him damages for lost wages. The board also ordered the company to 'take all reasonable steps to achieve the cessation and desisting forthwith of verbal racial harassment' in its warehouse.

Michael Betcherman is a member of the Bar of Ontario.

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Vancouver's great idea

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The conditions were that the licences had to remain with the firm and couldn't be sold and priority had to be given to the disabled.

Says Hanbury: 'About 20 per cent of the fares are handicapped, and this translates into about 200 to 300 fares a day.'

Jill Weiss, chairperson of the Coalition of the Disabled, an umbrella organization for some 130 groups in Vancouver, says the taxi service makes an enormous difference to people. There is another transit service for the handicapped, 'but,' says Weiss, 'you have to plan a few days ahead, and the priority list includes work, medical appointments and school, and down the list is social outings.'

Wayne Moser, regional consultant for the Canadian Paraplegic Association, and Doug Wilson, member of the B.C. Human Rights Council, both use the service occasionally and think it's great. Not only does it enable people to have a spontaneous business and social life, but, adds Wilson: 'The people travelling with you can get into the cab at the same time.'

Ontario Human Rights Commissioner Frazee speaks for the disabled across the country when she says: 'I'd be only too happy to see this enterprise in every major city in Canada. There certainly is a market to support it.'

Leslie Blake-Côté is an Ontario Human Rights Commissioner.

Profile

Dan McIntyre

by Leslie Blake-Côté

Dan McIntyre is the new Race Relations Commissioner of Ontario. Discrimination is something he knows. Even now, when he enters a room he is instinctively alert to the group's reaction to him. In fact, he shivers slightly every time he goes to the barber for a haircut.

He vividly remembers how, as a black growing up in Saint John, New Brunswick, a certain barber didn't want to cut his hair. The first time Dan sat in the chair, the barber nicked his ear. Figuring it was an accident, he went back again. It wasn't until the second time that he realized it was deliberate. Not one to be bullied, then or now, McIntyre recalls: 'I kept going back, and he never stopped nicking my ears.'

Facing discrimination moved McIntyre into the area of social work and human relations. A turning point in his life and the beginning of his involvement in human rights came with a man named Joe Drummond and, again, a barber shop. In 1964 Drummond was refused service at a barber shop and decided to rock the boat. He picketed.

McIntyre, 15 at the time, remembers that some people in the black community were taken aback and wondered why this Drummond was so strident. Many of them used to say that they wished they were white, but young blacks discovered that Drummond reinforced their sense of dignity. This eloquent man, who had little formal education, served as a role model for McIntyre, and, ironically, it was this incident that prompted the creation of the New Brunswick Human Rights Commission.

Dan McIntyre joined the staff of the Canadian Human Rights Commission in 1978 and was appointed director of its Ontario region in 1982. Prior to that he was an officer with the New Brunswick Human Rights Commission, a human rights lecturer and a social worker. He and his wife, Dale Gillespie, who is also a social worker, have three boys aged seven, four and one.

Gordon Fairweather, McIntyre's former boss and chief commissioner of the Canadian Human Rights Commission, knows him as a very personable and good-humoured man of great commitment to human rights.

One message stands out from all McIntyre's experiences. 'No matter

how long you've been here you're always viewed as a newcomer because of the colour of your skin.' McIntyre, whose own family has been in Canada since the 1700s, adds: 'The white population needs assistance to be able to define this new reality.'

What does he hope for during his tenure of office? Among other things, he hopes to see affirmative action programs established in the workplace; see the Race Relations Division act as consultant for various groups in the areas of employment equity for visible minorities in the workplace; see more research and policy development on the multiracial reality of Ontario; and influence policy development of the government of the day.

He wants to ensure race relations issues are not seen as a 'big-city problem', but rather an important social issue for all of Ontario, from rural areas and small towns to large cities. He wants to ensure that educational opportunities and social services are equally available to everyone, regardless of origin, religion or colour of skin.

Only when such things are actively in place, says our new commissioner, will the concept of 'Canadian' include racial minorities.

Leslie Blake-Côté is an Ontario Human Rights Commissioner.